



# RECOMMENDATIONS FOR A UNIFIED HARRIS COUNTY MANAGED ASSIGNED COUNSEL PROGRAM

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## SUMMARY

TIDC has reviewed Harris County's grant proposal and determined that a unified Harris County managed assigned counsel program (MAC) is both feasible and desirable. The office would improve quality, accountability, data collection, and efficiency. This report discusses some elements of Harris County's existing grant proposal and explores decision points the County should consider in creating a MAC. The model proposes the following:

- Structure and Case Types: The MAC will be a unified county agency that oversees the appointment of private counsel in all misdemeanor and noncapital felony trials that are not handled by the Public Defender Office (PDO), based on the PDO's case capacity. Appeals and postconviction appointments may be overseen by the MAC as well.
- Staffing: The MAC will be staffed by 38 employees, including supervising attorneys, social workers/alternative disposition specialists, and administrative staff.
- Oversight: The MAC will have an oversight board that ensures adequate independence from the judiciary and commissioners court.

TIDC staff look forward to continuing this conversation with Harris County and are glad to assist where needed. To ensure that the TIDC Board can consider Harris County's application at its August 29<sup>th</sup> meeting, TIDC staff recommends submitting an amended application by August 1<sup>st</sup>, 2019 so that TIDC's review process—including TIDC staff review, external review, and committee review—can occur.

## I. INTRODUCTION

Harris County has submitted an Improvement Grant application to TIDC to establish a managed assigned counsel office to oversee the appointment of counsel in the county courts. TIDC staff has been told that a plan from the district courts is being developed.

This report briefly discusses Harris County's public defense background, explores decision points the County should consider in creating a MAC, and makes recommendations for discussion purposes. TIDC has concluded that a MAC is both feasible and desirable. TIDC stands ready to assist Harris County with technical and financial assistance upon approval by the TIDC board.

## II. BACKGROUND

Harris County is the largest county in Texas, with approximately 4.7 million residents. The County has 16 criminal county courts-at-law and 22 criminal district courts. The County also has 3 juvenile district courts.

Indigent defendants are represented by private assigned counsel and by the Harris County Public Defender's Office (HCPDO). The HCPDO began operating in 2011 with the assistance of TIDC funding. The HCPDO represents defendants in non-capital felonies, misdemeanors, appeals, and 15.17 hearings (magistration). The office also represents juveniles in delinquency proceedings.

The HCPDO has taken a relatively small percentage of cases. In FY2018, the HCPDO closed out 5,054 cases, or about 8% of the indigent adult and juvenile cases.<sup>1</sup> It also represented 59,561 arrestees at magistration,<sup>2</sup> which are cases not handled by the private bar. While the HCPDO is doubling in size and caseload this year, most cases will continue to be handled by private assigned counsel.

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<sup>1</sup> There were also 32,432 non-capital felony and 20,676 misdemeanor indigent defense trial-level cases represented by private assigned counsel in FY2018, according to Harris County's TIDC expenditure report. This includes cases handled by contract counsel in some district courts.

<sup>2</sup> TIDC, Harris County Expenditure Report Summary, Fiscal Year 2018, <http://tide.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=101&fy=2018>.

Like most Texas counties, Harris County's indigent defense costs have risen in recent years—from \$35.4 million in FY14 to \$45.7 million in FY18, a 29% increase.<sup>3</sup> Per capita indigent defense expenditures have risen from \$8 per Harris County resident in FY14 to \$10 per resident in FY18, which is the same as the statewide average.<sup>4</sup> Harris County's appointment rates for felonies are slightly higher, and misdemeanors slightly lower, than the statewide average.

### III. WHY ESTABLISH A MAC?

A MAC is statutorily defined:

a program operated with public funds:

- (A) by a governmental entity, nonprofit corporation, or bar association under a written agreement with a governmental entity, other than an individual judge or court; and
- (B) for the purpose of appointing counsel under Article 26.04 of this code or Section 51.10, Family Code.<sup>5</sup>

TIDC has described the benefits and operations of MACs in two recent publications.<sup>6</sup> Harris County's FY2020 Improvement Grant application to TIDC also describes reasons to establish a MAC, based on the American Bar Association's *Ten Principles of a Public Defense Delivery System*:<sup>7</sup>

There are a number of improvements to the Harris County attorney appointment system that can be realized through the successful implementation of a MAC program. In considering the American Bar Association's *Ten Principles of a Public Defense Delivery System*, a

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<sup>3</sup> TIDC, Harris County Data Sheet, <http://tide.tamu.edu/public.net/Reports/DataSheet.aspx?cid=101>.

<sup>4</sup> *Id.*

<sup>5</sup> TEX. CODE CRIM. PROC. ART. 26.047(a)(2).

<sup>6</sup> TIDC, *Primer on Managed Assigned Counsel Programs* (Sept. 2017), [http://www.tidc.texas.gov/media/57815/tide\\_primer2017.pdf](http://www.tidc.texas.gov/media/57815/tide_primer2017.pdf); *Managed Assigned Counsel Programs in Operation* (Feb. 2018), [http://www.tidc.texas.gov/media/57919/tide\\_primersup2017.pdf](http://www.tidc.texas.gov/media/57919/tide_primersup2017.pdf).

<sup>7</sup> American Bar Association, *Ten Principles of a Public Defense Delivery System* (Feb. 2002) (hereinafter "ABA Ten Principles"), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclad\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclad_def_tenprinciplesbooklet.authcheckdam.pdf). "The Principles were created as a practical guide for governmental officials, policymakers, and other parties who are charged with creating and funding new, or improving existing, public defense delivery systems. The Principles constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney."

Harris County MAC program could immediately address several of these principles, including; (1) Defense function is independent of the judiciary, (5) Defense counsel's workload is controlled, (6) Defense counsel's ability, training, and expertise match case complexity, (7) the same attorney represents the client until the case is complete (8), Parity exists between defense and prosecution with regard to resources, and (10) defense counsel is supervised and reviewed for quality and efficiency.

A MAC would also address problems that TIDC identified in its October 2016 *Policy Monitoring Review of Harris County's Felony Indigent Defense Systems*. The report determined that the district courts' term assignments were not complying with TIDC's Contract Defender Rules,<sup>8</sup> and that the distribution of attorney appointments fell outside TIDC's threshold for presuming an appointment system is fair, neutral, and nondiscriminatory (with which the district courts disagreed).<sup>9</sup> A MAC would not make use of term assignments and could actively track appointments, ensuring that appointments are more evenly distributed to attorneys on the appointment lists.

Managed assigned counsel programs and public defender programs are important program areas for TIDC<sup>10</sup> because they can put in place mechanisms to ensure quality representation—mechanisms that do not exist in the assigned counsel and contract defender systems in Harris County courts today. Such mechanisms include assignment and payment of cases independent of the judiciary; tracking and payment of expert witnesses and interpreters assisting defense counsel outside of court; improved provision and coordination of support services to attorneys and clients like investigators, social workers, mitigation specialists, and immigration consultations; data collection and analysis; training; mentorship; caseload controls; and supervision.

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<sup>8</sup> TIDC, *Policy Monitoring Review of Harris County's Felony Indigent Defense Systems* (Oct. 7, 2016), at 13-17. See 1 TEX. ADMIN. CODE §§ 174.10–.25 for TIDC's contract defender rules.

<sup>9</sup> *Policy Monitoring Review*, at 15-17. The Harris County District Courts Trying Criminal Cases disagreed with the finding that appointments fell outside of TIDC's threshold, stating that the top 10% of attorneys received 2.96 times their respective share of appointments, not 3.28 times as TIDC found.

<sup>10</sup> TIDC, FY2020 Indigent Defense Improvement Grant Request for Applications (RFA), at 2, <http://www.tidc.texas.gov/media/58061/fy20-discretionary-grant-rfa-final.pdf>.

## IV. DECISION POINTS

Creating a MAC requires several key decisions. This section explains (1) key decision points, and (2) assumptions built into the model below. Wherever possible, TIDC cites applicable laws, standards, or studies.

### A. GOVERNANCE AND LEADERSHIP

Should the MAC have an oversight board?

Recommendation: Yes. The MAC should have an oversight board charged with selecting a director, setting policy, and developing a plan of operation.

TIDC requires counties receiving grant funds to establish a MAC to have an oversight board as a grant condition.<sup>11</sup> Harris County should determine the board's composition and responsibilities. An oversight board helps ensure a MAC's independence from undue judicial or political interference—a prerequisite for creating a defender office according to national standards.<sup>12</sup> An oversight board also prevents the concentration of power in the hands of a single individual and may incorporate diverse perspectives that help guide the office.

The board's composition should include an odd number of board members with a variety of professional backgrounds and lived experiences. Members should be knowledgeable in criminal law or the criminal justice system, but free from interests that would pose a conflict with the MAC. To ensure independence, TIDC staff recommends that no active judges, elected county officials, or their employees be on the board.

Board responsibilities vary, but most include (1) recommending the director; (2) providing policy guidance; and (3) developing a plan of operation.<sup>13</sup> MACs must be

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<sup>11</sup> While ART. 26.047, TEX. CODE CRIM. PROC., does not require an oversight board for the MAC, TIDC views it as a best practice.

<sup>12</sup> See Principle 1, ABA Ten Principles.

<sup>13</sup> ART. 26.047(c), TEX. CODE CRIM. PROC., requires that the Commissioners Court have a written plan of operation from an entity operating a MAC, which includes eight elements like a budget, personnel descriptions, caseload caps, etc. The Oversight Board can develop this.

overseen by an experienced director, and boards are in a good position to recommend to the Commissioners Court who that director should be.<sup>14</sup> While a director usually leads and manages the office's daily operations, boards are well-suited to setting policy for the office, as well as making budget requests.

### ***County Court Proposal***

The grant proposal submitted by the county criminal courts envisions three different committees and a board being established after a grant is approved, including: (1) hiring committee; (2) oversight committee; (3) advisory committee; and (4) governing board or board of directors. Establishing three committees and a board seems unnecessarily complicated. The County should consider if the process can be simplified by assigning tasks to a subcommittees of the oversight board, while ensuring all stakeholders can provide input at board and subcommittee meetings.

### ***Recommendation***

TIDC recommends that the office be governed by an oversight board with the power to recommend the selection and removal of the director. The model does not include direct costs for a board, which are normally minimal.

## **B. GOVERNMENT ENTITY OR PRIVATE ENTITY**

Should the MAC be operated by a government entity, nonprofit corporation, or bar association?

Recommendation: The office should be a government entity.

The County should consider whether its MAC will be operated by a county agency, nonprofit, or bar association.<sup>15</sup> A government agency may better coordinate with other county agencies and provide an institutional counterweight to the district attorney's office. A nonprofit may more readily embrace innovative practices. In

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<sup>14</sup> The MAC must have a director who meets minimum qualifications set by statute. See TEX. CODE CRIM. PROC. art. 26.047(d).

<sup>15</sup> State law allows for all three MAC structures. See TEX. CODE CRIM. PROC. art. 26.047(a)(2) and (b).

Texas, two MACs are nonprofits, and one is a government entity.<sup>16</sup> The grant application from the county criminal courts suggests a government agency model. TIDC staff see no reason to stray from Harris County's current application in this regard.

### C. COURT COVERAGE AND CASE COMPOSITION

1. Should the Harris County Managed Assigned Counsel Office oversee appointments and assigned counsel in both the county and district courts, or should there be a separate MAC for each?

Recommendation: This will be a unified MAC that oversees appointments in both county and district courts.

2. What types of cases should the MAC oversee? Should the MAC oversee appointments for appeals and post-conviction matters? Specialty courts? Capital cases?

Recommendation: The MAC should oversee the appointment and payment of counsel in all misdemeanors and non-capital felonies, as well as appeals and post-conviction matters. A MAC can also oversee appointments in specialty courts. Death penalty appointments must occur pursuant to art. 26.052, Code of Criminal Procedure, which does not allow for MAC appointments.

Harris County's grant proposal did not include district courts. TIDC staff has been informed that a district court proposal will be forthcoming. A letter submitted from the district courts as part of the grant proposal noted, however, that "the Harris County District Judges Trying Criminal Cases request TIDC consider allowing the felony courts to pursue a separate and independent MAC program...."

Every MAC in Texas oversees appointments in both felony and misdemeanor cases. Having separate county court and district court MACs will create unnecessary bureaucracy, costs, and confusion for the public and defendants. Representation for defendants with both misdemeanors and felonies would likely suffer compared to a unified system. Any differences that may exist between the processes for county and

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<sup>16</sup> The Lubbock Private Defender Office and the Capital Area Private Defender Service (serving Travis County) are nonprofit corporations. The Collin County Mental Health Managed Counsel Program is a government entity.

district courts can be addressed by creating misdemeanor and felony division directors.

Capital cases cannot be handled by a MAC, because those appointments are governed by Art. 26.052, Code of Criminal Procedure, which does not contemplate MAC oversight of capital appointments. However, appellate, post-conviction, and treatment courts may be overseen by a MAC. The same benefits that a MAC can bring for misdemeanor and felony trial appointments—Independent, fair distribution of appointments and payments to attorneys; assistance by investigators and social workers; caseload controls; supervision and monitoring of attorney performance; training; and mentoring—would apply in varying degrees to appeals, post-conviction matters, and treatment courts. In both Lubbock and Travis counties, the MAC appoints counsel in appeals.

A MAC can oversee all non-capital cases. TIDC staff would not recommend that entirely separate county and district court MACs be funded.

#### D. CASELOADS

What should the maximum attorney caseload be?

Recommendation: The MAC's caseload limits should be based on TIDC's *Guidelines for Indigent Defense Caseloads*. Attorneys should be appointed no more than 77 first degree, 105 second degree, 144 third degree, or 174 state jail felonies; or 216 Class A or 236 Class B misdemeanors; or an equivalent combination of cases.

When attorneys represent too many clients, they must often jettison core legal tasks, including research, investigation, client communication, and filing pertinent motions.<sup>17</sup> An assigned counsel system with a flat-fee payment structure incentivizes attorneys to accept too many cases, often resulting in substandard quality.<sup>18</sup> The

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<sup>17</sup> ABA Principle 5.

<sup>18</sup> Low fees exacerbate this problem, making it difficult for an attorney to earn a living while providing quality representation in appointed cases. See Norman Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense* at 4 (2011).

operating plans for Texas MACs are statutorily required to identify maximum allowable caseload limits for assigned counsel.<sup>19</sup>

TIDC has published evidence-based *Guidelines for Indigent Defense Caseloads*.<sup>20</sup> Prior to the publication of TIDC's caseload guidelines, the National Advisory Commission on Criminal Justice Standards and Goals, or NAC standards, were viewed as the best available caseload standard for researchers and public defender offices. In its 2013 evaluation of the Harris County Public Defender's Office, the Council of State Governments Justice Center found that 45% of felony indigent defense cases were represented by attorneys whose caseload exceeded the NAC standard (150 felony cases per year),<sup>21</sup> which exceed TIDC's caseload guidelines. A review of Harris County's Attorney Caseload Report reveals that many attorneys were paid in FY2018 for a number of cases in excess of TIDC's caseload guidelines.<sup>22</sup>

### ***County Court Proposal***

The county court proposal implies that the MAC will follow the TIDC caseload guidelines:

In State Fiscal Year 2018, appointed attorneys in Harris County disposed of approximately 24,465 cases for indigent defendants. Based on TIDC's Guidelines for Indigent Defense Caseloads, the recommended caseload for Class B misdemeanors is 236 cases, and Class A misdemeanors is 216 cases. Based on a weighted average of Harris County's misdemeanor caseload distribution, a maximum allowable caseload of 224 misdemeanor cases per attorney would allow the current pool of appointed attorneys to handle up to 35,840 cases annually.

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<sup>19</sup> TEX. CODE CRIM. PROC. art. 26.047(b)(3). To receive Improvement Grant funding from TIDC, a MAC would be required to have defined caseload/workload standards.

<sup>20</sup> Carmichael et al., Public Policy Research Institute at Texas A&M University, *Guidelines for Indigent Defense Caseloads* (2015), [http://www.tidc.texas.gov/media/31818/150122\\_weightedcl\\_final.pdf](http://www.tidc.texas.gov/media/31818/150122_weightedcl_final.pdf).

<sup>21</sup> Council of State Governments, *Improving Indigent Defense: Evaluation of the Harris County Public Defender* 13, Figure 2 (Sept. 30, 2013), <http://www.tidc.texas.gov/media/23579/jchcpdfinalreport.pdf>

<sup>22</sup> TIDC's Attorney Caseload Report is available at <http://tidc.tamu.edu/public.net/Reports/AttorneyCaseLoad.aspx>. Select "Harris" County and Fiscal Year "2018." Columns can be sorted by clicking on the column heading.

A similar analysis should be done for district court cases. Based on figures reported to TIDC, 286 private attorneys received at least one felony appointment in Harris County in FY2018. Based on TIDC's caseload guideline of 128 felonies per year, these 286 attorneys could handle 36,608 cases per year, more than the 32,432 non-capital felony assigned counsel and contract counsel cases paid to private counsel in FY2018.<sup>23</sup> However, since a not insubstantial number of these attorneys received very few felony cases, it is unclear if they are interested in carrying a higher caseload or if they were not getting appointments due to the structure of the appointment system today. It should also be noted that the HCPDO is expanding the number of felony cases it will be handling, so there will be a lower number of cases assigned to private assigned counsel in future years.

### ***TIDC Recommendation***

Data reported to TIDC does not break down felonies by type, so the district courts should do a similar analysis as the county courts, by case type, to determine how many attorneys are needed and should be approved for the appointment lists. Prior to the time when all attorneys apply to be on the appointment lists upon establishment of the MAC, the district courts (and county courts) may want to revisit the number of attorneys it wants and needs to be on the appointment lists.

TIDC recommends that Harris County follow TIDC's caseload guidelines, which would limit each attorney to 77 first degree, 105 second degree, 144 third degree, or 174 state jail felonies; or 216 Class A or 236 Class B misdemeanors; or an equivalent combination of cases. The model also assumes that managers will not carry a significant caseload, dedicating most of their time to supervision, administration, training, and leadership.

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<sup>23</sup> See Harris County Expenditure Report, Fiscal Year 2018, Combined County Report, <http://tide.tamu.edu/public.net/Reports/CountyFinancialReport.aspx?cid=101&fy=2018>.

## E. CASE ALLOCATION

What proportion of Harris County criminal cases should the MAC oversee? How should cases be split between the Harris County Public Defender Office and the Managed Assigned Counsel Office?

Recommendation: The MAC should oversee the appointment of counsel in all non-capital cases in which the HCPDO is not appointed, based on the HCPDO's capacity. The HCPDO must be given priority in the appointment of counsel to ensure full utilization of funded services. The HCPDO should continue to have control over the number of cases it receives in order to manage caseloads.

Art. 26.04(f), Code of Criminal Procedure, requires that, “[i]n a county in which a public defender’s office is created or designated under Article 26.044, the court or the court’s designee shall give priority in appointing that office to represent the defendant.” The 86<sup>th</sup> Legislature also enacted S.B. 583, which requires the priority appointment of a public defender’s office to be included in the county’s indigent defense plan, which the judges adopt and publish pursuant to Code of Criminal Procedure, Article 26.04(a).

If a MAC is established in Harris County, courts must prioritize appointing the HCPDO so it is fully utilized, while also respecting the office’s internal caseload controls to ensure high quality, effective representation is provided. Harris County’s existing system, which allows the HCPDO to control its caseload, should be maintained. Any cases that are not appointed to the HCPDO would then be appointed through the MAC.

## F. STAFFING, CONTRACTORS, AND SALARIES

1. What should the staffing levels for managing attorneys, investigators, social workers, support staff, immigration attorneys, and research attorneys be?

Recommendations:

**Approximate Total FTEs: 38**

**Central Office Staff (8 FTEs):**

- 1 Director
- 1 Holistic Defense Supervisor
- 1 Chief Investigator

- 1 Technical Support Manager
- 1 Financial Analyst
- 1 Research Attorney
- 2 support staff

**County Courts (12 FTEs proposed):**

- 1 Misdemeanor Division Director
- 4 Supervising Attorneys (1:35 supervisor-to-attorney ratio)
- 1 *Padilla* (immigration) attorney
- 3 staff in an alternative disposition/social worker/mitigation/case manager role
- 3 support staff

**District Courts (18 FTEs):** We suggest the following staffing levels:

- 1 Felony Division Director
- 5 Supervising Attorneys (1:40 supervisor-to-attorney ratio)
- 2 *Padilla* (immigration) attorneys
- 5 staff in an alternative disposition/social worker/mitigation/case manager role
- 5 support staff

**Contractors:** Attorneys will generally be assigned to cases on a rotational basis, taking into consideration attorney experience and expertise. Investigators will be assigned to cases when requested by attorneys. Experts will be approved by the MAC when requested by attorneys.

2. What should be the salary levels for managing attorneys, investigators, social workers, support staff, immigration attorneys, and the research attorney?

**Recommendation:** Staff salaries should be set in parity with the Harris County District Attorney's Office and the Harris County Public Defender's Office.

The County should decide (a) what kind of staff the office will employ, and (b) what it should pay staff at the MAC. As to pay, the County may look to the Harris County District Attorney's Office as a guide. National standards require pay and resource parity between the prosecution and defense functions.<sup>24</sup> The County can also look to the HCPDO as a guide.

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<sup>24</sup> ABA Principle 8.

Resource parity should extend to support staff.<sup>25</sup> Defense team alternative disposition specialists, social workers, caseworkers, and mitigation specialists provide specialized services critical to effective representation and beyond, such as creating plans for mental health and substance abuse treatment, housing, and other services in the community; locating and linking defendants to those services; and developing sentencing mitigation reports. Support staff dedicated to tasks like filing, scheduling, finance, and information technology are necessities for any office.

Supervising attorneys assist assigned attorneys and ensure that assigned attorneys are providing high-quality defense services. Supervising attorneys should do such things as: observe attorneys in court and trial and provide feedback on their performance; assist attorneys in preparing for trial, strategizing elements of cases, and answering legal questions; serve as second-chair;<sup>26</sup> respond to and investigate complaints about attorneys from judges, clients, and client family members; ensure attorneys are visiting clients at the jail; and conduct annual attorney performance reviews.<sup>27</sup> Supervising attorneys should also document attorney performance deficiencies, complaints, and disciplinary matters in the attorney's file, as well as begin any necessary proceedings to move an attorney to a lower level appointment list or remove an attorney from the appointment lists due to not meeting the MAC's standards of attorney performance.<sup>28</sup>

In-house resource attorneys like an immigration attorney and research attorney also offer critical support to trial attorneys. Under *Padilla v. Kentucky*,<sup>29</sup> defense attorneys have a constitutional obligation to inform their clients of the

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<sup>25</sup> ABA Principle 8.

<sup>26</sup> One concern raised about the MAC model in regard to supervision is that supervisors are potentially privy to information via attorneys they are supervising who are representing co-defendants. The Harris County MAC needs to develop a conflicts policy or protocol to ensure that supervisors assisting on a case or sitting second chair don't inadvertently assist on "both sides" of a case involving co-defendants. The MAC also needs to institute policies or protocols to address ethical issues like attorney-client privilege, confidentiality and waivers if supervisors are going to be discussing or assisting on cases with attorneys they are supervising, or reviewing case files.

<sup>27</sup> See how the MACs in Texas, San Mateo, Calif., and Mass. supervise, monitor, and evaluate attorney performance in *Managed Assigned Counsel Programs in Operation*, *supra* note 6.

<sup>28</sup>

<sup>29</sup> 559 U.S. 356 (2010).

immigration consequences of criminal convictions. A dedicated immigration attorney can help fulfill this duty by assisting trial attorneys with complex immigration matters and consulting with clients directly. A research attorney assists with motions drafting and other legal research. Division directors supervise all staff and monitor their performance and workloads.

***Recommendations for the Central Office***

TIDC recommends the following staffing levels and rationales for consideration by Harris County for the central office of the MAC. Many of these staff were included in the original county court proposal and could serve both the county courts and district courts:

**Director:** The director would develop and oversee all MAC operations, and represent the office before commissioners court, the judiciary, county stakeholder meetings, and the public.

**Holistic Defense Supervisor:** This position was originally included in the county court proposal. Such a position also exists at the Travis County MAC. The Holistic Defense Supervisor would oversee staff like social workers, case managers, mitigation specialists, and alternative disposition specialists.

**Chief Investigator:** The chief investigator would oversee the list of contract investigators, review investigator requests, appoint investigators to cases, review investigator vouchers, and organize trainings for investigators.

**Technical Support Manager:** This position was originally included in the county court proposal. The Technical Support Manager would be the “first line” of technology troubleshooting” and support for the MAC’s technical needs. This person would also represent the MAC at county-wide technical meetings, particularly those involving the justice system.

**Financial Analyst:** Another position originally included in the county court proposal. This position would oversee budgeting, accounting, expenditure tracking, budget analysis, and financial reporting. The Financial Analyst would also be charged with overseeing the TIDC grant and other funding opportunities.

**Research Attorney:** Although the research attorney assistance needs of 245 felony trial attorneys and 140-160 misdemeanor attorneys exceeds the capacity of one research attorney, it would be desirable to have at least one on staff. The research attorney can also assist the MAC in internal legal research matters.

**Support Staff:** At least two support staff for the central office would be needed to operate the office and assist the other 6 central office staff, including the director.

#### ***Recommendations for County Courts***

The county courts provided overall staffing levels in their grant proposal and some details on specific positions, but additional details are needed, particularly in the areas of executive personnel, social workers, and salaries. Some staff members listed in the county court proposal—including the Holistic Defense Supervisor, Chief Investigator, Technical Support Manager, and Financial Analyst—could serve both county and district courts. In our staffing model, we have transferred some staff members from the county court proposal to central office staff. We have also proposed some scaling back of supervisors based on the current number of attorneys on the appointment list. The MAC could reduce the number of attorneys on the appointment list and reduce the supervisor-to-attorney ratio as well.

TIDC recommends the following staffing levels for consideration by Harris County for the county courts:

- 1 Misdemeanor Division Director
- 4 Supervising Attorneys (1:35 supervisor-to-attorney ratio)
- 1 *Padilla* (immigration) attorney
- 3 staff in an alternative disposition/social worker/mitigation/case manager role
- 3 support staff
- 12 division staff overall

#### ***Recommendations for District Courts***

Following are recommended staffing levels given the number of private attorneys receiving felony appointments in Harris County in FY2018 and number of

indigent felony cases handled by those attorneys (32,432).<sup>30</sup> According to the county's Attorney Caseload Report, 286 private attorneys received at least one felony appointment in FY2018. Of those, 41 attorneys' caseloads were a majority misdemeanor, so we assumed for calculation purposes that they would be included in misdemeanor supervision ratios, leaving approximately 245 felony attorneys who are not public defenders. The staffing levels below are based on TIDC's MAC publications, as well as staffing levels of other Texas MACs and the need for additional staffing expressed by those MACs.

TIDC recommends the following staffing levels and rationales for consideration by Harris County for the district courts:

- 1 Felony Division Director
- 5 Supervising Attorneys (approx. 1:40 supervisor-to-attorney ratio based on 245 attorneys; ratio includes Felony Division Director as supervisor)
- 2 *Padilla* (immigration) attorneys
- 5 staff in an alternative disposition/social worker/mitigation/caseworker role
- 5 support staff
- 18 division staff overall

**Felony Division Director:** Given the number of felony courts, attorneys receiving felony appointments, and number of felony cases, a director dedicated to overseeing a felony division would be appropriate.

**Supervising Attorneys:** 5 attorneys, or approx. 1 supervisor per 40 attorneys, including the division director for ratio purposes. The supervisor levels were determined based on supervisor levels at other MACs, as well as indications from the district courts that the lawyers on the felony appointment list had a lot of experience and did not need a high level of supervision.

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<sup>30</sup> TIDC is not privy to all the information that judges, court personnel, and felony indigent defense counsel have, so these staffing figures should be considered recommendations that can be modified based on the needs of assigned counsel, the courts, and the indigent defense system.

The approximate supervisor ratios for other MACs in Texas are as follows:

<b>County</b>	<b>Supervisor-to-Attorney Ratio</b>
Collin	1:25
Lubbock	1:40 (2 supervisors, including director, to 80 lawyers)
Travis	1:75 (3 attorney supervisors, including director, to 225 lawyers)

Note: Travis County has submitted a grant application to add 2 supervising attorneys and 2 client advocates to respond to client complaints. By adding those 2 supervising attorneys, that would be a 1:45 supervisor-to-attorney ratio with 2 client advocates assisting.

In San Mateo, California, the MAC has 114 attorneys and 4 supervisors, including the chief and assistant chief, which would be a 1:28.5 supervisor-to-attorney ratio.<sup>31</sup>

Each of the 5 supervising attorneys could oversee assigned counsel in 4-5 courts. There would also be a Felony Division Director overseeing those supervisors and serving as a liaison to the district courts. If the number of attorneys on the felony appointment lists are reduced, the supervising attorneys could potentially be reduced as well. After the HCPDO expands, there will also be fewer felony cases and there may be a need for fewer attorneys on the appointment list.

***Padilla* (immigration) attorneys: 2 attorneys.** The *Padilla* attorneys would provide immigration consultations with attorneys and clients. The attorneys would not represent defendants in their immigration cases. The number of *Padilla* attorneys is adapted from Travis County's current and requested staffing levels under a recent grant request. Travis County's MAC has 225 attorneys on its misdemeanor and felony appointment lists and 25,580 cases in FY2018. Travis has one *Padilla* attorney and is seeking to add 2 more (resulting in a 1:75 *Padilla*-to-trial attorney ratio). Harris had 245 private attorneys who received a majority felony appointments and 32,432 cases in FY2018. Two *Padilla* attorneys for the felony division would give

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<sup>31</sup> There are no national standards for MACs.

it a 1:122.5 *Padilla*-to-trial attorney ratio. While this is a higher ratio than Travis, the HCPDO will be gathering immigration information at initial bail hearings and its own immigration attorneys will be making assessments about potential immigration consequences that will be provided to counsel of record in the case. We also anticipate that it will take some time for private attorneys to fully utilize this resource.

Staff in an alternative disposition/social worker/mitigation/case manager roles: 5 staff. These staffing levels are roughly based on staffing levels at other MACs in Texas, but there is wide variation. MACs like those in Lubbock and Collin County are the sole providers of indigent defense services to defendants with mental illness in both felony and misdemeanor cases, and as such their staffing levels for case managers and social workers are relatively higher. The Travis County Mental Health Public Defender represents many misdemeanor and a growing number of felony defendants with mental illness, and that office has its own staff of social workers and caseworkers. In Harris County as well, the HCPDO has a mental health division that represents misdemeanor and some felony defendants with mental illness. In its letter to County Judge Hidalgo and county commissioners, HCCLA said that it would like “real attention paid to investigative and punishment help, sentencing advocates/mitigation specialists, and private investigators because that has historically been an area that needs strengthening.” The district courts are consulting with the defense bar, and this is an area that is worth examining further to ensure the MAC is adequately staffed.

**Support Staff: 5 staff for felony division.** This staffing level is based on 1 support staff for the division and director; 2 support staff for the supervising attorneys; 1 support staff for alternative disposition specialists; and 1 support staff for the *Padilla* and research attorneys.

## G. OPERATIONS

1. What should the budget for operating expenses, including office space, equipment, expert witnesses, training, travel, and technology be?

Recommendation: No recommendation made.

TIDC does not have sufficient information to address this question. The county courts have proposed a first-year budget (\$3.3 million), but TIDC analysis would benefit from a more detailed budget.

There should also be parity between the defense and prosecution in facilities, technology, and other resources.<sup>32</sup> When establishing a budget, the County should consider fringe benefits for staff, operating costs for the office, technology, costs for training and travel for staff, and office space. The County should consider technology and office space resources for assigned counsel, such as computer terminals and printers, free or discounted LexisNexis or Westlaw subscriptions, and work and meeting spaces. The County should also consider that investigation and expert witness fees will likely increase due to added emphasis on utilizing these resources.

## H. SUMMARY FEEDBACK FROM GRANTS REVIEW COMMITTEE AND STAFF

Members of TIDC's external grants review committee strongly recommended a single MAC program covering both felony and misdemeanor courts to prevent unnecessary administrative inefficiencies. They also noted that the proposal needs more detail regarding oversight and where the program will be administratively housed within county government to ensure appropriate independence from the judiciary. More detail is also needed to justify the staffing levels for each category of employee. On the budget, the committee requested the cost basis for case management and training components. Committee members also would likely be assured that the MAC will address ethical issues like privilege, confidentiality, and waivers through policies and protocols instituted by MAC leadership.

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<sup>32</sup> ABA Principle 8.

The committee requested more detail on how the program would impact who makes indigency determinations and when such determinations occur. Since appointment authority will be delegated to the MAC, the County should consider similarly centralizing indigency determinations to streamline appointment processes. If the MAC is charged with interviewing defendants requesting counsel and making indigency determinations, that would require additional staff beyond what is proposed here.

## V. POTENTIAL TIDC GRANT FUNDING

### Potential TIDC Grant Funding

TIDC's Improvement Grant Program helps counties establish MACs and other programs, like public defender offices. Improvement grants normally last for four years. Grant funding typically pays for 80% of the MAC costs in the first year, and goes down 20% each year for years two, three, and four. Over those four years, TIDC pays for approximately 50% of the MAC costs.

Grant funding is contingent on recommendation of a grants review committee and a vote of the full TIDC Board. In addition to Improvement Grant funding from TIDC, Harris County will continue to receive formula grant funding to reimburse the county for its other indigent defense expenditures.

The county courts have submitted a grant proposal with a total budget of \$3.3 million. In the first year, the County would cover \$661,133 of that, with TIDC covering \$2.6 million. While that does not include a district court component, our proposal does reduce the size of the misdemeanor division compared to the proposal from the county courts, thus saving some money. **Based on our preliminary analysis and staffing levels, adding a felony division and central office component, while reducing the size of the misdemeanor division, would likely result in an office costing approximately \$4.5-\$5 million per year.**

## VI. CONCLUSION

TIDC applauds Harris County for the steps it is taking to improve indigent defense. TIDC has determined that a Harris County MAC is both feasible and

desirable. The office would improve quality, accountability, data, and efficiency. TIDC stands ready to offer technical and possibly financial assistance.